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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1193

STATE OF WISCONSIN
EX REL. JOHN C. RIZZO,

Petitioner,

vs.

THE COUNTY COURT OF KENOSHA COUNTY
BRANCH II, THE HONORABLE EARL
MORTON, JUDGE OF SAID COURT
PRESIDING THEREIN,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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STATEMENT OF CASE

Petitioner, John C. Rizzo, is charged in the Circuit Court of Kenosha County, Wisconsin, with the crime of operating a gambling game which is alleged to have taken place in Kenosha County, Wisconsin, during the period between January 1, 1960, and January 28, 1963. Prior to his having been charged with this offense, he had been interrogated by a magistrate in Kenosha County in a proceeding pursuant to Sec. 945.025, Wis. Stats. This is in essence a one-man grand jury proceeding. In his appearance before the magistrate, he refused on the grounds of

self-incrimination to answer two questions relating to the Ogden Social Club in the City of Milwaukee, Milwaukee County, Wisconsin, and a third as to whether or not he had any knowledge regarding the murder of one Tony Biernat which had taken place in Kenosha County. The questions were certified to the County Court of Kenosha County, and the court ordered him under the provisions of Sec. 325.34 (now Sec. 885), Wisconsin Statutes, the immunity statute, to answer these questions.

Subsequently, John C. Rizzo was charged with violation of Sec. 945.03 (1), Wisconsin Statutes, and before a preliminary hearing could be held on September 30, 1965, before the Honorable Earl Morton, County Judge of Kenosha County, Wisconsin, Rizzo filed a petition for an alternate writ of prohibition with the Circuit Court of Kenosha County, Wisconsin. The petition (Respondent's Appendix A) alleges that Rizzo was subpoenaed and appeared before the Honorable Harry V. Carlson, Judge of County Court, and that he refused to answer certain questions on the grounds that his answers would tend to incriminate him; that thereafter he was "granted immunity" from criminal prosecution, and notwithstanding such grant of immunity, was subsequently prosecuted for violation of Sec. 945.03 (1), Wis. Stats.

There is no allegation in the petition that the crime for which he is being prosecuted is the same crime about which he was forced to testify before Judge Carlson. Nor is there an allegation that there is any connection between the two matters or that his compelled answers provided a link to evidence to be used against him in the charges pending against him.

After a hearing on the alternate writ of prohibition, the Circuit Court of Kenosha County denied the writ of prohibition and granted an order for a writ of consultation directing that the preliminary hearing proceed in County Court. Petitioner then appealed to the Supreme Court of the State of Wisconsin, which affirmed the Circuit Court denial of the writ of prohibition. On a rehearing application in a *per curiam* decision, the Wisconsin Supreme Court stated that its original opinion is "restricted to whether the writ of prohibition should have been issued on the facts presented". The court further indicated that the defendant was not foreclosed from raising the question of whether the testimony he gave under immunity provided a link to evidence which forms the basis of his present prosecution.

REASONS FOR DENYING WRIT

Petitioner has never been tried for the crime with which he is charged, and the decision of the Wisconsin Supreme Court guarantees to him the right to contest at his trial the reception of any evidence which was obtained by virtue of the answers which he gave under compulsion. With these protections, it would seem unwarranted for this court to review the case at this time on certiorari since the decision of the Wisconsin Supreme Court is not a final adjudication of the issue within the meaning of 28 U. S. C. 1257 (3), *Arceneaux v. Louisiana* (1964), 376 U. S. 336.

In seeking a writ of prohibition, it was the position of petitioner that having been granted immunity as to three specific questions, two of them relating to gambling, he is entitled as a matter of law to be free from any prosecu-

tion relating to gambling, wherever and whenever committed.

Petitioner also suggests in his petition to this court that there may be some connection between the gambling activities which he testified to under compulsion and the gambling violations with which he is presently facing criminal charges in the County Court of Kenosha County. However, *no such allegation appears in the record.* The Wisconsin Supreme Court in its decision pointed out that the record did not support any suggestion that the answers Rizzo gave under compulsion were used as a link in the chain of evidence which supports the present prosecution. As the court said:

> "Yet no connection is apparent between Rizzo's previous gambling in Milwaukee and the present charges. Since there is no apparent connection, it is Rizzo's burden to show the court that a substantial connection *could* exist. *Rizzo has offered nothing but the orbiting speculations of counsel.*" (Emphasis supplied.) (App. 15)

Even the concurring opinion of Justice Gordon points out that the record before the court did not establish that the answers made by Rizzo under compulsion furnished a link in the chain of evidence for the present prosecution. (App. 17)

On motion for rehearing a *per curiam* memorandum stated in part:

> "However, what was said as to the insufficiency of the evidence is not to foreclose the defendant from raising the question, or to be deemed *res adjudicata* of the issue, of whether the testimony he gave under im-

> munity at the John Doe proceeding provided the link for the basis of the present prosecution pending in the county court of Kenosha county if the issue is raised in that proceeding. The language of the opinion is restricted to whether the writ of prohibition should have issued on the facts presented." (App. 21)

The petitioner herein asks that this court review the denial of the writ of prohibition by the Supreme Court of the State of Wisconsin. In effect the petitioner is asking this court to supersede the judicial processes of the State of Wisconsin on the pretext that a federal constitutional question may become involved at some future time in connection with the use of evidence obtained in violation of the petitioner's Fifth Amendment rights.

Such position is premature. The Wisconsin Supreme Court in its decision has clearly indicated that any evidence obtained directly or indirectly as a result of Rizzo's compelled answers could not be used against him. The decision preserves the right to the petitioner to challenge any testimony offered in his preliminary examination or trial on the commercial gambling charge which he may claim or suspect was obtained by virtue of his compelled answers.

Nor is petitioner denied the right to make motions to the court to force the state to disclose the source of its evidence against him and to demonstrate that such evidence was not obtained through a link arising from the answers given by Rizzo under compulsion.

Petitioner cites *Counselman v. Hitchcock* (1892), 142 U. S. 547, 585, 12 Sup. Ct. 195, 35 L. Ed. 1110:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

At Page 586 of the same opinion the court said:

"In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offense to which the question relates.*" (Emphasis supplied.)

The state concedes that the rationale of the *Counselman* case would be extended to cover answers which would furnish a link in the chain of evidence needed to prosecute, as this court has pointed out in *Malloy v. Hogan* (1964), 378 U. S. 1, and *Hoffman v. United States* (1951), 341 U. S. 479. However, that question is not before the court.

Finally, the petitioner relies upon *Brown v. Walker* (1896), 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, by lifting out of context from Page 601 of that opinion a sentence which describes immunity as an act of "general amnesty". Apparently petitioner would construe this language to mean that this amnesty applies to all crimes of the type the witness is compelled to testify about. In other words, if the witness testifies about any type of gambling, he is forever immune from prosecution for any gambling offense. Thus petitioner would claim that his admissions that he played dice and cards for money and worked the stick at the Ogden Social Club in Milwaukee more than six years previous to the hearing, would act as a general grant of immun-

ity or amnesty for all of his gambling activities wherever they took place. This despite the fact that the playing of dice and cards for money, a misdemeanor, where the statute of limitations is three years, and "working the stick", a possible felony, were barred by the statute of limitations. (App. 15) See *Brown v. Walker*, supra, Page 598.

In reply to the final paragraph of the petition, we merely point out again that this record is barren of any indication that the investigation being conducted before Judge Carlson at the time of Rizzo's testimony under compulsion had any connection with the charges which the petitioner presently faces in Kenosha County Court.

CONCLUSION

The petitioner has failed to allege in his original papers that the crime for which he is being prosecuted is the same crime about which he was compelled to testify before Judge Carlson; he has failed to allege that there is any connection between his compelled testimony and the criminal charges he now faces; he has failed to allege that his compelled answers provided a link to evidence to be used against him in the pending charges. Since the decision of the Wisconsin Supreme Court is not a final adjudication of the issue and the petitioner will have an opportunity at the preliminary hearing and the trial to establish any connection between his compelled testimony and the

evidence used against him, the petition for certiorari in this court is premature.

Respectfully submitted,

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